ARKANSAS SUPREME COURT

No. 06-372

WILIFREDO G. HERNANDEZ Appellant v. LARRY NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION Appellee	**Opinion Delivered** January 18, 2007 *PRO SE* APPEAL FROM THE CIRCUIT COURT OF LINCOLN COUNTY, LCV 2005-120, HON. ROBERT HOLDEN WYATT, JR., JUDGE AFFIRMED.

PER CURIAM

In 2005, appellant Wilifredo G. Hernandez, an inmate in the custody of the Arkansas Department of Correction, filed a petition for writ of habeas corpus in the circuit court of Lincoln County, seeking relief on a judgment entered in Howard County for convictions on charges of murder in the second degree, fleeing, aggravated assault, and felon in possession of firearms. The petition was denied by order entered January 9, 2006, and now before this court is appellant's appeal of that order.

The judgment and commitment order entered September 24, 2004, reflects that appellant entered negotiated pleas of guilty or nolo contendere to the charges and was sentenced to 240 months' imprisonment on the murder charge, seventy-two months' imprisonment on the fleeing charge, seventy-two months' imprisonment on the assault charge, and 240 months' imprisonment on the felon-in-possession charge. The sentences on the murder and felon-in-possession charges

were designated to run consecutively to each other, and the fleeing and assault charges were designated as concurrent to the other charges, for an aggregate sentence of 480 months' imprisonment. The judgment indicates as to the murder charge that it is a departure from the sentencing grid, and a departure report is attached reflecting that the judge found five aggravating factors and no mitigating factors as a reason for the departure from the presumptive sentence.

Appellant's points on appeal essentially raise only one issue which challenges the circuit court's findings that appellant failed to state grounds to support issuance of the writ. Appellant argues that the allegations in his petition showed the trial court lacked jurisdiction and that the judgment was invalid on its face, in that appellant received unconstitutional sentences.

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

It is well settled that the burden is on the petitioner in a habeas corpus petition to establish that the trial court lacked jurisdiction or that the commitment was invalid on its face; otherwise, there is no basis for a finding that a writ of habeas corpus should issue. *Young v. Norris*, 365 Ark. 219, ___S.W.3d ___ (2006) (*per curiam*). The petitioner must plead either the facial invalidity or the lack of jurisdiction and make a "showing by affidavit or other evidence, [of] probable cause to believe" he is illegally detained. *Id.* at 221, ___S.W.3d at ___.

Appellant contends that the sentences were illegal to the extent that the sentences were consecutive and because the sentences fell outside of the presumptive range for the charges. He cites

Blakely v. Washington, 542 U.S. 296 (2004), in support of his argument, apparently asserting that because the presumptive standards in Ark. Code Ann. § 16-90-803 (Supp. 2001) applicable at the time were mandatory, the presumptive sentence was actually the maximum sentence, rather than the maximum sentence as stated in the statute describing the offense.

Appellant's argument concerning consecutive sentences seems to be based upon an assertion that to impose consecutive sentences results in a *Blakely* violation. Regardless as to whether the aggregate sentence may have exceeded the presumptive sentence as to any individual charge, the trial court had discretion to impose consecutive sentences. The decision to impose consecutive or concurrent sentences lies solely within the province of the trial judge. *Smith v. State*, 354 Ark. 226, 118 S.W.3d 542 (2003).

As to appellant's assertion that the sentence imposed on the murder charge was illegal because it exceeded the presumptive sentence, the claim is not one cognizable in a petition for writ of habeas corpus. It is true that we will treat allegations of void or illegal sentences similar to the way that we treat problems of subject-matter jurisdiction. *Taylor v. State*, 354 Ark. 450, 125 S.W.3d 174 (2003). Detention for an illegal period of time is precisely what a writ of habeas corpus is designed to correct. *Id*. at 455, 125 S.W.3d 178. However, a habeas corpus proceeding does not afford a prisoner an opportunity to retry his case, and is not a substitute for direct appeal or postconviction relief. *Friend v. Norris*, 364 Ark. 315, ___ S.W.3d ___ (2005) (*per curiam*); *Meny v. Norris*, 340 Ark. 418, 420, 13 S.W.3d 143, 144 (2000) (*per curiam*).

Here, should appellant's allegations of a *Blakely* violation have any merit, consideration of the issue would require an examination of the plea proceedings or more of the record than appears before us, and is therefore not suitable for a habeas corpus proceeding. As the appellee notes,

appellant's plea statement indicates that he understood that he would be sentenced by the court and was waiving his right to a jury. In *Blakely*, the trial court that accepted the defendant's plea did not have a sufficient factual basis for a determination of the elements to impose a sentence outside the standard range. There, the defendant had neither admitted those facts nor had a jury determined them. Because, in this case, the factual basis for the plea is not indicated on the record, the circuit court could not determine the issue without inquiry beyond that appropriate to a habeas corpus proceeding.

Because appellant failed to state cognizable claims, he did not meet his burden and has failed to show any basis for a finding that a writ of habeas corpus should issue. We accordingly affirm the denial of appellant's petition by the court.

Affirmed.